MOTION FILED
MAR 2 4 2004

(2)

No. 03-1199

In The
Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The Supreme Court Of Wisconsin

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF PETITIONER

LAURA A. FOGGAN
(*Counsel of Record*)
ELIZABETH A. EASTWOOD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amicus Curiae Complex Insurance Claims Litigation Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The Complex Insurance Claims Litigation Association ("CICLA") submits this motion for leave to file an *amicus curiae* brief in support of Petitioner Employers Insurance Company of Wausau ("Wausau") pursuant to Supreme Court Rule 37.2(b). CICLA's *amicus curiae* brief presents relevant information beyond the scope of the submissions by the parties to this case and focuses on the potential significance of this case to numerous others beyond Wausau and the respondents. Through its participation, CICLA seeks to provide "unique information or perspective that can help the court." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("the classic role of *amicus curiae* [is to] assist[] in a case of general public interest, supplement[] the efforts of counsel, and draw[] the court's attention to law that escaped consideration").

As required by Supreme Court Rule 37.2(a), CICLA sought the consent of the parties to file this *amicus curiae* brief. Wausau consented to the filing of CICLA's *amicus curiae* brief, as did respondents The Travelers Indemnity Company and Transamerica Premier Insurance Company.[1] This motion is necessary, however, because Respondent Johnson Controls, Inc. ("JCI") withheld its consent to the submission of an *amicus curiae* brief by CICLA.

---

[1] The letters from counsel consenting to the filing of this *amicus curiae* brief have been filed in the office of the Clerk.

CICLA is a trade association of major property and casualty insurance carriers. CICLA is vitally interested in this case because its members have underwritten and continue to underwrite a substantial portion of the liability insurance contracts in the State of Wisconsin and nationwide, and because many of its members' liability insurance contracts contain a "suit" provision similar or identical to the one at issue herein. CICLA – and its predecessor the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae* in federal and state courts nationwide. In addition, CICLA participated in this case as an *amicus curiae* before the Wisconsin Supreme Court. CICLA therefore is uniquely situated to assess and explain the potential ramifications of the Wisconsin Supreme Court's decision for insurers throughout the country.[2]

As an association of insurers, CICLA brings special expertise in, and knowledge of, disputes concerning the meaning of the term "suit" in liability insurance contracts and how judicial interpretations of the term affect insurers. Further, as a result of its extensive experience as an advocate for insurers in courts nationwide, CICLA is uniquely qualified to offer a broader perspective than the parties on the ramifications of the Wisconsin Supreme

---

[2] CICLA seeks to file this brief on behalf of CICLA member companies Farmers Insurance Group, Royal & SunAlliance, St. Paul Fire & Marine Insurance Company, and Selective Insurance Company of America. CICLA does not appear on behalf of the following members who are or were parties to this case or whose affiliates are or were parties in this case: ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a Division of Federal Insurance Company, Hartford Insurance Group, Liberty Mutual Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company.

Court decision in this case, a decision in which the court (1) reached an issue that was *not* presented by the policyholder's appeal; (2) abandoned its own nearly ten-year-old precedent on the meaning of the term "suit"; (3) failed to afford Wausau notice that the court would decide the "suit" issue; and (4) failed to give Wausau any opportunity to be heard on the "suit" issue. As CICLA demonstrates, this Court should grant *certiorari* because the Wisconsin Supreme Court violated Wausau's right to due process by refusing to afford Wausau notice and an opportunity to be heard on the "suit" issue. Moreover, the Wisconsin Supreme Court's conspicuous refusal to hear Wausau's arguments on the "suit" issue resulted in a decision which is extremely prejudicial to Wausau and to all others that insure risks in Wisconsin. CICLA respectfully requests leave of the Court to file the attached *amicus curiae* brief in support of Wausau.

Respectfully submitted,

LAURA A. FOGGAN
(counsel of record)
ELIZABETH A. EASTWOOD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amicus Curiae Complex Insurance Claims Litigation Association

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. WAUSAU WAS DEPRIVED OF NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE "SUIT" ISSUE AND THUS WAS DENIED DUE PROCESS 6

A. The Wisconsin Supreme Court's Ruling In JCI's Favor On An Issue JCI Did Not Raise Undermines Confidence In A Fair And Impartial Judiciary 6

B. There Can Be No Justification For The Wisconsin Supreme Court's Failure To Afford Wausau Notice And An Opportunity To Be Heard On The "Suit" Issue 7

C. The Wisconsin Supreme Court Failed To Articulate Any Basis For Departing From Stare Decisis As To The "Suit" Issue 10

II. THE SUPREME COURT OF WISCONSIN'S SURPRISE *SUA SPONTE* 180-DEGREE TURN ON THE "SUIT" ISSUE IS PROFOUNDLY PREJUDICIAL TO INSURERS 12

A. The Wisconsin Supreme Court Erroneously Concluded That Overruling *Edgerton* Would Not Harm Any Significant Interest Of Insurers 12

TABLE OF CONTENTS – Continued

Page

B. The Wisconsin Supreme Court Made Unsupported Determinations Concerning Purported "Practical Difficulties" Posed By *Edgerton*'s "Suit" Rule And Ignored Real Practical Difficulties That Overruling *Edgerton* Will Cause For Insurers 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

AIU Insurance Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990) 12

Bouie v. City of Columbia, 378 U.S. 347 (1964) 9

Buss v. Superior Court, 939 P.2d 766 (Cal. 1997) 19

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 8, 9

City of Edgerton v. General Casualty Co., 517 N.W.2d 463 (Wis. 1994) ..... *passim*

Foster-Gardner, Inc. v. National Union Fire Insurance Co., 959 P.2d 265 (Cal. 1998) 12, 18, 20

General Casualty Co. v. Hills, 561 N.W.2d 718 (Wis. 1997) 10, 11

Grieb v. Citizens Casualty Co., 148 N.W.2d 103 (Wis. 1967) 16

Johnson Controls, Inc. v. Employers Insurance of Wausau, 665 N.W.2d 257 (Wis. 2003) ..... *passim*

Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co., 655 N.E.2d 842 (Ill. 1995) 17

Mowry v. Badger State Mutual Casualty Co., 385 N.W.2d 171 (Wis. 1986) 18

Newhouse v. Citizens Security Mutual Insurance Co., 501 N.W.2d 1 (Wis. 1993) 18

Richards v. Jefferson County, 517 U.S. 793 (1996) 9

Ryan v. Royal Insurance Co., 916 F.2d 731 (1st Cir. 1990) 19

TABLE OF AUTHORITIES – Continued

Page

Towne Realty, Inc. v. Zurich Insurance Co., 548 N.W.2d 64 (Wis. 1996) 17

United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 578 N.E.2d 926 (Ill. 1991) 17

MISCELLANEOUS

29A Am. Jur. *Insurance* § 1452, at 562 16

Cynthia E. Smith, *Wisconsin Supreme Court Releases Landmark Environmental Insurance Decision Reversing Its 1994 Holdings In Edgerton – You May Now Have Insurance Coverage For Environmental Claims*, Michael Best & Friedrich LLP Land & Resources Alert (July 2003), *available at* http://www.mbf-law.com/pubs/client/LR_alert_7_03.cfm 5

David J. Edquist, *Edgerton and Johnson Controls: New Life for Coverage of Old Environmental Liabilities*, von Briesen & Rober, s.c. Environmental Law Bulletin (July 2003), *available at* http://www.vonbriesen.com/resourcelibrary/docs/environmental/environmental_liability_coverage.pdf 5

George C. Christie, *Objectivity in the Law*, 78 Yale L.J. 1311 (1969) 6

Pete Millard, *Cleanup Ruling Supreme For Business*, The Business Journal of Milwaukee (July 21, 2003), *available at* http://milwaukee.bizjournals.com/milwaukee/stories/2003/07/21/newscolumn1.html 5

BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the Complex Insurance Claims Litigation Association ("CICLA"). Petitioner Employers Insurance Company of Wausau and Respondents The Travelers Indemnity Company and Transamerica Premier Insurance Company have consented to CICLA's submission of this brief. Respondent Johnson Controls, Inc. has withheld consent. A motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b) is included with this brief. The letters from counsel for the parties that consented to the filing of this *amicus curiae* brief have been filed in the office of the Clerk.

INTEREST OF *AMICUS CURIAE*[3]

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance carriers.[4] Since its formation in 1986,

---

[3] This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[4] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Royal & SunAlliance, St. Paul Fire & Marine Insurance Company, and Selective Insurance Company of America. CICLA does not appear on behalf of the following members who are or were parties to this case or whose affiliates are or were parties in this case: ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a Division of Federal Insurance Company, Hartford Insurance Group, Liberty Mutual Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company.

CICLA (formerly known as the Insurance Environmental Litigation Association) has filed more than 600 *amicus curiae* briefs in complex insurance cases. CICLA is vitally interested in this case because its members have underwritten and continue to underwrite a substantial portion of the liability insurance contracts in the State of Wisconsin and nationwide, and because many of its members' liability insurance contracts contain a "suit" provision similar or identical to the one at issue herein.

As an association of insurers, CICLA brings special expertise in, and knowledge of, disputes concerning the meaning of the term "suit" in liability insurance contracts and how judicial interpretations of the term affect insurers. Further, as a result of its extensive experience as an advocate for insurers in courts nationwide, CICLA is uniquely qualified to offer a broader perspective than the parties on the ramifications of the Wisconsin Supreme Court decision in this case, a decision in which the court (1) reached an issue that was *not* presented by the policyholder's appeal; (2) abandoned its own nearly ten-year-old precedent on the meaning of the term "suit"; (3) failed to afford petitioner Employers Insurance of Wausau ("Wausau") notice that the court would decide the "suit" issue; and (4) failed to give Wausau any opportunity to be heard on the "suit" issue. As CICLA demonstrates, the Wisconsin Supreme Court violated Wausau's right to due process by failing to afford Wausau notice and an opportunity to be heard on the "suit" issue. Moreover, the Wisconsin Supreme Court's conspicuous refusal to hear Wausau's arguments on the "suit" issue resulted in a decision which is extremely prejudicial to Wausau and to all others that insure risks in Wisconsin.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* and agree to review the ruling below in order to protect fundamental due process interests and correct a serious prejudice to insurers. This case is not simply a dispute over the meaning of insurance contract terms under state law. To the contrary, it presents fundamental questions of judicial fairness and threatens unjustly to alter insurer rights and expectations.

In its decision giving rise to the instant petition, the Supreme Court of Wisconsin asked and answered two questions involving the interpretation of two separate and distinct terms in a comprehensive general liability insurance policy: (A) "Are CERCLA Response Costs Damages?" (the "damages" question); and (B) "Do PRP Letters Trigger The Insurer's Duty to Defend?" (the "suit" question). *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 270, 281 (Wis. 2003). On both questions the Wisconsin Supreme Court overturned its prior rulings in *City of Edgerton v. General Casualty Company*, 517 N.W.2d 463 (Wis. 1994).

In deciding the "damages" question, the Wisconsin Supreme Court made an unfortunate decision in CICLA's view, but it did so after a full and fair airing of the issue when the question was properly presented to it, and petitioner is not challenging that ruling here. The Wisconsin Supreme Court's decision on the "suit" question, however, was more than just unfortunate – it deprived petitioner of its right to due process under the Fourteenth Amendment, and the violation of petitioner's right was severe enough to warrant intervention by this Court.

The "damages" question had been raised on appeal by Johnson Controls, Inc. ("JCI"); had been addressed by the

trial court and the Wisconsin Court of Appeals; and was the subject of at least ten separate briefs and extensive oral argument to the Wisconsin Supreme Court. Further, in reversing its own prior decision on the meaning of "damages," the Wisconsin Supreme Court articulated in detail its rationale for departing from *stare decisis* on that point. In marked contrast, the "suit" question was *not* presented by JCI's appeal; had *not* been addressed by the trial court or the Wisconsin Court of Appeals; and was *not* briefed or argued to the Wisconsin Supreme Court. Instead, the Wisconsin Supreme Court raised the "suit" question *sua sponte*, without giving petitioner any notice that the court would address the issue. Further, the Wisconsin Supreme Court decided the "suit" question without affording petitioner any opportunity to be heard on the issue – Wausau had not briefed the issue before the decision, and its petition for rehearing, which sought an opportunity to be heard on the "suit" question, was denied without comment. Moreover, with respect to the "suit" issue, the Wisconsin Supreme Court articulated no rationale whatsoever for its departure from *stare decisis*.

Because it deprived Wausau of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court did not consider the substantial prejudice that its surprise *sua sponte* decision would cause Wausau and other insurers. While the decision's retroactive effect may be litigated further, insurers covering risks in Wisconsin can now anticipate that policyholders will present claims for millions of dollars incurred to respond to PRP letters over the past ten years – claims that insurers could not have anticipated while *Edgerton* governed the meaning of "suit"

in Wisconsin.[5] In addition, the Wisconsin Supreme Court's decision dramatically expands the scope of a liability insurer's prospective defense obligations in a way that is likely to give policyholders a windfall in the form of a defense against environmental claims that ultimately will prove to be beyond the scope of coverage under their liability insurance contracts.

The Wisconsin Supreme Court's surprise *sua sponte* decision on the "suit" issue is a glaring violation of Wausau's due process rights which will cause substantial harm to Wausau and to other insurers. This Court should grant *certiorari* to correct this due process violation and reaffirm the right of litigants to be heard on issues before they are decided by the judiciary.

---

[5] Policyholder advocates have recommended that environmental claims for which insurers denied coverage pursuant to *Edgerton* be resubmitted. *See* David J. Edquist, *Edgerton and Johnson Controls: New Life for Coverage of Old Environmental Liabilities*, von Briesen & Rober, s.c. Environmental Law Bulletin (July 2003), *available at* http://www.vonbriesen.com/resourcelibrary/docs/environmental/environmental_liability_coverage.pdf ("*Johnson Controls* may impact insureds' rights to reimbursement for settlement payments and defense costs incurred in environmental cleanup matters, where claims were previously denied based on the *Edgerton* ruling."); Pete Millard, *Cleanup Ruling Supreme For Business*, The Business Journal of Milwaukee (July 21, 2003), *available at* http://milwaukee.bizjournals.com/milwaukee/stories/2003/07/21/newscolumn1.html ("Environmental lawyers are digging through old files to revive cases for corporate clients. . . . "); Cynthia E. Smith, *Wisconsin Supreme Court Releases Landmark Environmental Insurance Decision Reversing Its 1994 Holdings In Edgerton – You May Now Have Insurance Coverage For Environmental Claims*, Michael Best & Friedrich LLP Land & Resources Alert (July 2003), *available at* http://www.mbf-law.com/pubs/client/LR_alert_7_03.cfm ("Based upon this change in the law, you are encouraged to review your environmental claims history").

ARGUMENT

I. WAUSAU WAS DEPRIVED OF NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE "SUIT" ISSUE AND THUS WAS DENIED DUE PROCESS.

A. The Wisconsin Supreme Court's Ruling In JCI's Favor On An Issue JCI Did Not Raise Undermines Confidence In A Fair And Impartial Judiciary.

As set forth in detail in Wausau's petition, JCI asked the Wisconsin Supreme Court *only* to overrule *Edgerton* on the meaning of the term "damages" and to hold that environmental response costs incurred pursuant to CERCLA qualify as "damages" under a comprehensive general liability insurance policy. JCI did not ask the Wisconsin Supreme Court to address the separate holding in *Edgerton* that only an actual lawsuit – and not a PRP letter – qualifies as a "suit" triggering a liability insurer's duty to defend. Because JCI did not ask that *Edgerton*'s "suit" rule be overturned, Wausau had no warning that it might be necessary to defend *Edgerton*'s rule on that issue. In deciding nonetheless to rule on the "suit" issue and to resolve it in JCI's favor, the Wisconsin Supreme Court departed from due process requirements.

In this case, like any other litigant in this country, Wausau had a fundamental right to expect that the Wisconsin Supreme Court would provide it a full and fair opportunity to be heard on all issues, but instead the court acted precipitously on the "suit" issue. When courts act in this fashion, they undermine what one commentator has identified as "the primary social purpose" of the adversarial judicial process, that is "deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated." George C.

Christie, *Objectivity in the Law*, 78 Yale L.J. 1311, 1329 (1969).

Simply stated, the "suit" issue need not and should not have been reached by the Wisconsin Supreme Court in this case. By reaching out to decide the issue despite JCI's failure to raise it on its own behalf, the Wisconsin Supreme Court erred.

B. There Can Be No Justification For The Wisconsin Supreme Court's Failure To Afford Wausau Notice And An Opportunity To Be Heard On The "Suit" Issue.

As set forth above, the Supreme Court of Wisconsin erred when it reached out to consider an issue never raised by JCI on appeal. The Wisconsin Supreme Court compounded its error by failing to afford Wausau notice or any opportunity to be heard on the "suit" issue. The Wisconsin Supreme Court could have mitigated the injustice done to Wausau: having decided *sua sponte* to address the "suit" issue in addition to the "damages" issue raised by JCI, the Wisconsin Supreme Court could have advised the parties of that decision, thereby giving Wausau the opportunity to place before the court its very substantial arguments on the "suit" issue by addressing them in its briefs and at oral argument. However, the Wisconsin Supreme Court did not request briefing on the "suit" issue, nor did any member of the court question the parties on the issue during oral argument. Wausau literally learned of the Wisconsin Supreme Court's decision to revisit *Edgerton*'s "suit" rule only by reading the Wisconsin Supreme Court's opinion issued on July 11, 2003, without having been afforded any opportunity to be heard on the issue beforehand. Moreover, when Wausau filed a timely motion for rehearing, which pointed out that Wausau had

been deprived of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court denied Wausau's motion without explanation. Thus, having deprived Wausau of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court also refused the chance to rectify its error.

This Court's precedents make clear that the Wisconsin Supreme Court's failure to provide Wausau with an opportunity to be heard on the "suit" issue deprived Wausau of its Constitutional right to due process. More than seventy years ago this Court considered a case similar to the case at bar in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, a bank had filed a bill in equity to challenge a tax assessment, which was dismissed by a Missouri state trial court. On appeal, the Missouri Supreme Court disagreed with the trial court's grounds for dismissing the bank's bill in equity. However, the Missouri Supreme Court then proceeded, *sua sponte* and without affording the bank notice or an opportunity to be heard, to (a) consider whether the bank should have filed a complaint with the state tax commission; (b) overrule its own six-year-old precedent holding that the state tax commission had no authority to consider such a complaint; and (c) hold that the bank's claim was barred by its failure to make such a complaint to the state tax commission. On *certiorari*, this Court overturned the Missouri Supreme Court's decision on due process grounds. Writing for a unanimous court, Mr. Justice Brandeis stated as follows:

> We are not now concerned with the rights of the plaintiff on the merits . . . or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. ***Our present concern is solely with the question whether the plaintiff has been accorded due***

> ***process in the primary sense – whether it has had an opportunity to present its case and be heard in its support.*** Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to reexamine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review. But, ***while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.***

281 U.S. at 681-82 (emphasis added). The *Brinkerhoff-Faris* Court concluded that "the Supreme Court of Missouri must be reversed because it has denied to the plaintiff 'due process of law' – using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* at 678.

The rule articulated in *Brinkerhoff-Faris* – that a state court may not deprive a litigant of "an opportunity to present its case and be heard in its support" – repeatedly has been reaffirmed by this Court. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (citing *Brinkerhoff-Faris* and holding that the Alabama Supreme Court violated due process when it deprived taxpayers of opportunity to be heard on constitutional challenge to state statute); *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (citing *Brinkerhoff-Faris* and holding that the South Carolina Supreme Court violated due process by applying its 1961 construction of a criminal statute to conduct that occurred in 1960 such that defendants lacked notice that conduct would be considered a criminal offense).

In this case Wausau clearly was denied "an opportunity to present its case and be heard in its support" with

regard to the "suit" issue. For this reason, the Wisconsin Supreme Court's decision on the "suit" issue cannot stand.

C. The Wisconsin Supreme Court Failed To Articulate Any Basis For Departing From *Stare Decisis* As To The "Suit" Issue.

The Wisconsin Supreme Court explicitly acknowledged that, under its own jurisprudence, its disagreement with *Edgerton* was not sufficient reason to overrule it, and that "[o]verruling *Edgerton* requires a compelling justification." 665 N.W.2d at 285 (citations omitted). The court further stated that a decision to depart from precedent "must be explained carefully and fully to insure that the court is not acting in an arbitrary or capricious manner." *Id.* at 285 (citation omitted). Nevertheless, the Wisconsin Supreme Court provided no explanation whatsoever of its decision to overrule *Edgerton* on the "suit" issue.

The Wisconsin Supreme Court concluded that it was justified in overruling *Edgerton* because it believed that *Edgerton* was fundamentally irreconcilable with its subsequent decision in *General Casualty Co. v. Hills*, 561 N.W.2d 718 (Wis. 1997), such that the efforts of lower courts in Wisconsin to adhere to both *Edgerton* and *Hills* resulted in "arbitrary and illogical distinctions." 665 N.W.2d at 289. Importantly, however, the issue on which *Hills* diverged from *Edgerton* – and created what the Wisconsin Supreme Court in this case viewed as an irreconcilable conflict – was the issue of whether environmental response costs under CERCLA can ever qualify as "damages." *Hills* did not address the separate issue of whether a PRP letter – as distinguished from a lawsuit – implicates a liability insurer's duty to defend. Instead, *Hills* left completely intact and unqualified the bright-line rule of *Edgerton* that a liability insurer's duty to defend

extends only to a "suit" and not to a PRP letter. Thus, the perceived incongruity between *Edgerton* and *Hills*, on which the Wisconsin Supreme Court relied to justify overruling *Edgerton* on the "damages" issue, simply has no application whatsoever to the "suit" issue. Indeed, because *Edgerton* adopted a bright-line rule on the "suit" issue, there can be no suggestion that it has generated any confusion at all on the part of the Wisconsin courts tasked with applying it.

The Wisconsin Supreme Court recognized that the difficulty in applying *Edgerton* and *Hills* involved the "damages" issue alone:

> By overruling *Edgerton's* conclusion on the "as damages" language and adopting the *Hills* rationale, we will rectify the present confusion and arbitrariness surrounding CERCLA cost recovery actions in Wisconsin, while heading off some of the troubling issues still on the horizon. The resulting rule should be clear, comprehensive, and logical: The liability imposed under CERCLA against an insured who has contributed to the contamination of property is covered "as damages" if the costs to satisfy that liability are expended to remediate, or pay for the remediation of, the damaged property, provided that the costs are not excluded by some other provision of the policy.

665 N.W.2d at 292.

The Wisconsin Supreme Court may have assumed implicitly that its abandonment of the *Edgerton* rule on "damages" was reason enough to jettison *Edgerton*'s "suit" rule as well. To the extent the court made such an assumption, Wausau should have been given the chance to debunk it. As Wausau demonstrates (*Cert.* Pet. at 16, n. 14), courts in a number of jurisdictions have held that environmental cleanup costs qualify as "damages" but nonetheless have recognized that a PRP letter is not a

"suit" triggering an insurer's duty to defend. Indeed, the California Supreme Court considered and explicitly rejected the argument that if cleanup costs are "damages," PRP letters must be "suits." *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 283-284 (Cal. 1998) (rejecting policyholder's contention that "[t]he conclusion that coercive administrative actions are 'suits' flows naturally from this Court's holding in *AIU*[6] that costs incurred to comply with an injunction mandating cleanup or to reimburse a government agency for cleanup expenses . . . constitute 'damages' under a CGL policy.")

The Wisconsin Supreme Court not only failed to offer a "compelling justification" for overruling *Edgerton* on the "suit" issue – it offered no justification at all. Moreover, as Petitioner has amply demonstrated (*see Cert.* Pet. at 15-18), there are many powerful arguments militating in favor of adhering to *stare decisis* on the "suit" issue – arguments the Wisconsin Supreme Court never considered because it refused to hear them, in violation of Wausau's due process rights.

II. THE SUPREME COURT OF WISCONSIN'S SURPRISE *SUA SPONTE* 180-DEGREE TURN ON THE "SUIT" ISSUE IS PROFOUNDLY PREJUDICIAL TO INSURERS.

A. The Wisconsin Supreme Court Erroneously Concluded That Overruling *Edgerton* Would Not Harm Any Significant Interest Of Insurers.

In deciding that departure from *stare decisis* to overrule *Edgerton* was justified, the Wisconsin Supreme

---

[6] *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990)

Court expressly determined that doing so would not harm any "significant" interests of insurers. 665 N.W.2d at 294. Because the "suit" issue had not been presented to the Court by the policyholder's appeal, and because the Court had not advised the parties of its intention to consider the "suit" issue, the Court made its determination in this regard without the benefit of any evidence whatsoever concerning what impact a reversal on the "suit" issue actually could be expected to have on insurers. In the absence of any evidence, the Court determined:

(a) that insurers' reliance on *Edgerton* could be relevant for *stare decisis* purposes only if it affected "how insurance contracts have been drafted and bargained for";

(b) that insurers' and insureds' reliance on *Edgerton* in "assess[ing] their respective expected costs and obligations [] and [] account[ing] accordingly" was mere "ancillary reliance" that is *not* relevant for stare decisis purposes; and

(c) that the insurers thus had no reliance interests worthy of protection because most liability insurance contracts issued since 1985 have contained absolute pollution exclusions that would bar coverage for CERCLA-related liabilities.

665 N.W.2d at 294. In the Wisconsin Supreme Court's own words:

> Because the meaning of insurance contract terms should remain settled whenever possible, we are generally disinclined to reverse prior interpretations of these terms.
>
> However, the CGL's treatment of CERCLA claims presents unusual, if not unique, policy construction problems, which justify this court's deviation from general principle. Most, if not all,

> CGL policies executed today will not be governed by either this decision *or* by *Edgerton*. The CGL policy language at issue in this case was drafted long ago and has since been rendered largely inapplicable in the context of CERCLA actions. Beginning in 1985, insurance companies revised their standardized CGL policies to include absolute pollution exclusions from coverage. [] The CGL policies given effect in this case are no longer being marketed, *nor were they at any time after Edgerton*. Therefore, the insurers cannot credibly argue that *Edgerton* established significant reliance interests, in terms of how insurance contracts have been drafted and bargained for, that will be harmed by its reversal.

665 N.W.2d at 293-294 (emphasis in original). By casting the reliance issue in these terms, the Court overlooked (1) the very real extent to which current environmental cleanup litigation arises from conduct many years or even decades ago and thus still potentially implicates pre-1985 liability insurance contracts that lack absolute pollution exclusions; (2) the substantial magnitude of costs that may be claimed for responding to environmental cleanup demands, which policyholders in the absence of *Edgerton* now will characterize as costs of defending a "suit"; (3) the fact that most liability insurance contracts do not have a limit of liability applicable to defense costs, such that expanding the definition of "suit" to include PRP letters will increase a liability insurer's potential defense cost liability exponentially; and (4) the fact that creating insurance coverage where none existed under *Edgerton* will require higher premiums from Wisconsin policyholders so that insurers will have funds to pay for the unforeseen liabilities.

Simply stated, the Wisconsin Supreme Court was wrong to conclude that because post-1985 policies have

absolute pollution exclusions, reversing *Edgerton*'s "suit" rule could inflict no significant harm on insurers. The Wisconsin Supreme Court's erroneous conclusion was the direct result of its reaching out to decide an issue not presented on appeal, failing to give notice of its intention to address the "suit" issue, and failing to afford petitioner any opportunity to be heard on the issue.

B. The Wisconsin Supreme Court Made Unsupported Determinations Concerning Purported "Practical Difficulties" Posed By *Edgerton*'s "Suit" Rule And Ignored Real Practical Difficulties Overruling *Edgerton* Will Cause For Insurers.

The Wisconsin Supreme Court opined that "[a] literal definition of the term 'suit' in the CGL policy presents some practical difficulties in understanding and reconciling the obligations of the parties in the presence of a CERCLA claim." 665 N.W.2d at 282. As there was no evidentiary record concerning the "practical" implications of the "suit" rule established by *Edgerton*, the "practical difficulties" identified by the Wisconsin Supreme Court were devoid of factual support and highly dubious. Moreover, because it failed to afford Wausau any opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court overlooked the very real – and very costly – practical difficulties insurers face when the duty to defend is expanded to encompass not only "suits" but PRP letters as well.

Central to the Wisconsin Supreme Court's conclusion that insurers should be required to defend against PRP letters as well as "suits" was its determination – based on no evidence whatsoever – that PRP letters are "more analogous to a civil complaint than a traditional demand

letter." 665 N.W.2d at 284. In reality, however, a PRP letter differs vastly from a complaint in terms of providing the information an insurance carrier needs in order to determine whether it has any duty to defend. In Wisconsin, as in most states, the existence of a duty to defend is determined by comparing the terms of the insurance contract to the allegations of the complaint. *See, e.g., Grieb v. Citizens Cas. Co.*, 148 N.W.2d 103, 106 (Wis. 1967) ("the insurer is under an obligation to defend only if it could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint" (quoting 29A Am. Jur. *Insurance* § 1452, at 562)). Unlike complaints, however, PRP letters generally do not include the sort of details that would permit an insurer to determine whether coverage under its liability insurance contract potentially is implicated, *e.g.*, how and when the environmental contamination occurred. Indeed, the Illinois Supreme Court, in concluding that only "an action in a court of law" qualifies as a "suit," relied explicitly on the fact that an insurer must analyze the allegations of a "complaint" to determine whether it has any defense obligation:

> The definition of the word "suit" as requiring an action in a court of law is further supported by analyzing the connection between the filing of a complaint and the duty to defend. Whether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint and comparing these allegations to the policy provisions. If the facts alleged in the underlying complaint fall within or even potentially within policy coverage, the insurer has a duty to defend its insured against the complaint. Thus, the duty to defend extends only to suits and not to allegations, accusations or claims which have not been embodied within

> the context of a complaint. In the instant case [where the policyholder had received a PRP letter], a complaint alleging liability for property damage has never been filed against Lapham-Hickey. Without a complaint, there is no "suit." And without a "suit," Protection's duty to defend Lapham-Hickey is not triggered.

Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co., 655 N.E.2d 842, 846 (Ill. 1995) (citing *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 930 (Ill. 1991).

The lack of specific details in a PRP letter leaves the insurer in a quandary if a PRP letter is deemed to be a "suit," or the "functional equivalent" thereof, giving rise to a duty to defend. As the Wisconsin Supreme Court observed in this case, when an insurer is assessing the existence of a defense obligation, "[i]f there is any doubt about the duty to defend, it must be resolved in favor of the insured." 665 N.W.2d at 283 (quoting *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64, 67 (Wis. 1996)). If a PRP letter qualifies as a "suit," and the letter is silent as to how contamination occurred, or whether any "property damage" took place within the policy period of the insurer's policy, the policyholder can be expected to argue that the PRP letter leaves doubt which must be resolved in favor of a duty to defend. If Wisconsin courts accept this policyholder argument, a liability insurer's defense obligation often will extend to environmental claims which, once the relevant facts became available, will prove never to have presented any potential for coverage under the insurer's policy.

The risk that equating a PRP letter with a "suit" will give policyholders a windfall in the form of a defense against claims not potentially covered under their policies is particularly acute in Wisconsin. As noted in Wausau's

petition, under Wisconsin law an insurer from whom a defense is requested risks being estopped to raise coverage defenses unless it either provides the requested defense or intervenes in the underlying action to seek a stay pending a declaratory judgment on the existence of coverage. Wausau *Cert.* Pet. at 17-18 (citing *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1 (Wis. 1993) and *Mowry v. Badger State Mut. Cas. Co.*, 385 N.W.2d 171 (Wis. 1986)). Unlike an underlying lawsuit, however, a PRP letter is not something in which an insurer can intervene to seek a stay.

This problem disappears if a PRP letter is treated as a "claim" rather than as a "suit," because the CGL policy language at issue here draws a clear distinction between the two: the insurer "shall have the right and duty to defend any suit," whereas the insurer "*may* make such investigation and settlement of any claim or suit as it deems expedient." When a PRP letter received by a policyholder alleges liability for environmental cleanup costs that qualify as "damages" under governing law, an insurer has every incentive to investigate the "claim" asserted in the PRP letter, and to involve itself in the defense and possible settlement of that "claim" *if its investigation discloses that the claim is potentially covered under its insurance policy. See Foster-Gardner*, 959 P.2d at 283 (noting that where insurers ultimately will have indemnity obligations arising from administrative proceedings, "insurers have an inherent incentive to participate in those proceedings where the costs are ascertained.") Stated another way, where a PRP letter is treated as a "claim" seeking "damages," it is likely that the insurer will choose to assist in the defense of the claim *if* it is potentially covered. If, however, a PRP letter is treated as a "suit," it is extremely likely that the insurer will have no choice but to defend *whether or not* the claim is potentially

covered. Under the latter scenario – *i.e.*, the scenario created by the Wisconsin Supreme Court decision at issue here – the insurer will either (a) bear the cost of defending non-covered claims for which it never collected any premium; or (b) to the extent permitted by Wisconsin law, initiate litigation against the policyholder seeking to recoup defense costs paid for environmental claims which ultimately prove never to have been potentially covered under its policies. *See, e.g., Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997). Neither is an efficient result.

Equating a PRP letter with a "suit" triggering the duty to defend creates other practical difficulties for insurers as well. As pointed out by Wausau (*Cert.* Pet. at 18), requiring insurers to defend against PRP letters will increase disputes and litigation between insurers and policyholders over the characterization of remedial investigation costs. Once policyholders have succeeded in expanding the definition of "suit" to include a PRP letter, their next objective will be expanding the definition of "defense costs" to include amounts spent on remedial investigation, so that their ability to recover such amounts from insurers will be unconstrained by any applicable policy limit. Moreover, because there are so many types of PRP letters, with some being "coercive" and others much less so, the Wisconsin Supreme Court's ruling in this case may not be the last word on whether every PRP letter rises to the level of a "suit." Courts in some jurisdictions have adopted a "hybrid" approach and ruled that whether a particular PRP letter constitutes a "suit" depends on the degree of "coerciveness," such that a state environmental agency's mere "invitation to voluntary action" would *not* be a "suit." *See, e.g., Ryan v. Royal Ins. Co.*, 916 F.2d 731, 741-742 (1st Cir. 1990).

The Wisconsin Supreme Court's decision here, which abandons the bright-line "suit" rule of *Edgerton*, will

increase litigation and generate exactly the sort of uncertainty and confusion among lower courts in Wisconsin that the court sought to avoid by overruling *Edgerton*'s "damages" rule. *See Foster-Gardner*, 959 P.2d at 286 (concluding that equating PRP letters with "suits" would "open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the 'functional equivalent of a suit brought in a court of law.'") (internal quotation omitted).

For all of these reasons, the Wisconsin Supreme Court's decision causes severe prejudice to insurers, in ways the court almost certainly never contemplated. The court's failure to foresee the prejudice caused by its ruling is the direct result of its failure to afford Wausau notice and an opportunity to be heard on the "suit" issue, which deprived Wausau of due process.

CONCLUSION

The Wisconsin Supreme Court's surprise *sua sponte* decision on the "suit" issue clearly violated Wausau's due process rights, and that decision is highly prejudicial to Wausau and to insurers generally. The petition for *certiorari* should be granted.

Respectfully submitted,

LAURA A. FOGGAN
(*Counsel of Record*)
ELIZABETH A. EASTWOOD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000